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FOR ARGUMENT

No. 03-221

In The

Supreme Court of the United States

CHERYL K. PLILER, Warden of California State Prison – Sacramento,

Petitioner,

v.

RICHARD HERMAN FORD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF FEDERAL DEFENDERS IN THE NINTH CIRCUIT, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Amici curiae are federal public defender offices and community defender offices in judicial districts in the Ninth Circuit. *Amici* hereby respectfully move for leave to file the attached *amici curiae* brief in this case. The consent of the attorney for the Respondent has been obtained. The consent of the attorney for the Petitioner was requested but refused.

The interest of *amici* in this case arises from the fact that they are often appointed to represent indigent criminal defendants in federal habeas corpus actions challenging state court judgments, frequently after the petitioner has initiated the proceeding *pro se*. Since the advent of the Antiterrorism and Effective Death Penalty Act, and its one-year statute of limitations, a recurring issue in many cases in which *amici* are appointed is whether the federal action has been filed within the one-year period and, if not, whether there is a basis for the court to consider the late filed petition or claims. *Amici* support the judgment in favor of Respondent in the Court of Appeals below, and respectfully urge the Court to affirm it on appeal.

Amici's brief addresses the issue of equitable tolling. In the judgment below, the Ninth Circuit stated that "[a]lthough [it] need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Petition for Writ of Certiorari, Appendix A-35. The court reasoned that "[t]he district court's error in failing properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him

as to the legal effect of a dismissal of his petitions were 'extraordinary circumstances' beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations." *Id.*

Petitioner did not seek certiorari on the equitable tolling issue. As *amici*'s brief makes clear, the lower federal courts have invoked the time-honored doctrine of equitable tolling to ameliorate the harsh consequences of the one-year statute of limitations as appropriate on a case-by-case basis, and Respondent has a particularly strong case for tolling. *Amici* believe that if the Court is inclined to consider whether equitable tolling applies in the case at bar, the Court should remand the case for resolution of this highly fact-based question. Nevertheless, *amici* submit this brief in the event that the Court decides to address the equitable tolling issue, whether by determining if Respondent is entitled to tolling; addressing the availability of equitable tolling generally under the Anti-terrorism and Effective Death Penalty Act; or by announcing standards to address tolling claims under the Act.

Amici's brief "brings to the attention of the Court relevant matter not already brought to its attention by the parties," and therefore "may be of considerable help to the Court." Sup. Ct. R. 37.1. Counsel for Petitioner withheld consent to the filing of *amici*'s brief on the grounds that it addresses an issue that was not a holding in the Ninth Circuit and would bring "tangential" issues before this Court. *Amici* respectfully suggest that their brief addresses an issue that provides a powerful alternative basis

for finding Respondent's petitions timely, and an issue of utmost importance to habeas petitioners they represent.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. AEDPA'S "1-YEAR PERIOD OF LIMITATION" IS A STATUTE OF LIMITATION SUBJECT TO EQUITABLE TOLLING	6
A. Introduction	6
B. The Statutory Language	7
C. Justice Stevens' Concurring Opinion in *Duncan v. Walker* Recognizes the Availability of Equitable Tolling under AEDPA	8
D. As Ten Circuit Courts of Appeals Have Concluded, AEDPA's One-Year Limitation Period Is Subject to Equitable Tolling	10
1. Limitations Periods in Federal Statutes Are Presumptively Subject to Equitable Tolling, and This Court Has Found Equitable Tolling Available in Numerous Contexts	11
2. Equitable Tolling Is Consistent with AEDPA's Language, Structure, Purpose and Legislative History	13
II. FACTORS GUIDING ANALYSES OF EQUITABLE TOLLING CLAIMS UNDER AEDPA	18
III. FORD IS ENTITLED TO EQUITABLE TOLLING	23
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 11

Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000) 24

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 12, 20, 28

Bowen v. City of New York, 476 U.S. 467 (1986) 6

Braun v. Sauerwein, 77 U.S. (10 Wall.) 218 (1869) 11

Burger v. Scott, 317 F.3d 1133 (10th Cir. 2003) 10, 18

Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 6, 12, 14, 27, 28

Calderon v. Ashmus, 523 U.S. 740 (1998) 8, 16

Calderon v. United States District Court (Beeler), 128 F.3d 1283 (9th Cir. 1997) ..... *passim*

Castro v. United States, 124 S. Ct. 786 (2003) 24, 29

Cort v. Ash, 422 U.S. 66 (1975) 16

David v. Hall, 318 F.3d 343 (1st Cir.), *cert. denied*, 124 S. Ct. 66 (2003) 10

Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998) 10, 13, 14, 16

Delaney v. Matesanz, 264 F.3d 7 (1st Cir. 2001) 25

Donald v. Cook Co. Sheriff's Department, 95 F.3d 548 (7th Cir. 1996) 29

Drew v. Department of Corrections, 297 F.3d 1278 (11th Cir. 2002), *cert. denied sub nom. Drew v. Crosby*, 537 U.S. 1237 (2003) 10

Duncan v. Walker, 533 U.S. 167 (2001) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Dunlap v. United States, 250 F.3d 1001 (6th Cir. 2001) 10, 20

Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999) 19

Flanders v. Graves, 299 F.3d 974 (8th Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003) 10

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) 22

Griffin v. Rogers, 308 F.3d 647 (6th Cir. 2002) 10

Hanger v. Abbott, 73 U.S. (6 Wall.) 532 (1867) 22

Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) 10, 14, 19

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) 29

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 19

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) ..... *passim*

Kelly v. Small, 315 F.3d 1063 (9th Cir.), *cert. denied*, 123 S. Ct. 2094 (2003) 25

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 18, 19

Lonchar v. Thomas, 517 U.S. 314 (1996) 15, 26

Miller v. New Jersey State Department of Corrections, 145 F.3d 616 (3d Cir. 1998) ..... *passim*

Neverson v. Bissonnette, 261 F.3d 120 (1st Cir. 2001) 11

Nowaczyk v. Warden, New Hampshire State Prison, 299 F.3d 69 (1st Cir. 2002) 24

TABLE OF AUTHORITIES – Continued

Page

Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947) 22

Rose v. Lundy, 455 U.S. 509 (1982) ..... *passim*

Rotella v. Wood, 528 U.S. 549 (2000) 11

Slack v. McDaniel, 529 U.S. 473 (2000) 6, 23, 26

Thompson v. I.N.S., 375 U.S. 384 (1964) 28

Tillema v. Long, 253 F.3d 494 (9th Cir. 2001) 21, 25, 26

United States v. Patterson, 211 F.3d 927 (5th Cir. 2000) 29, 30

Warren v. Garvin, 219 F.3d 111 (2d Cir. 2000) 10, 21

Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) 20

Wilson v. Battles, 302 F.3d 745 (7th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003) 10, 18

York v. Galetka, 314 F.3d 522 (10th Cir. 2003) 26, 27

Young v. United States, 535 U.S. 43 (2002) 11, 12, 15

Zarvela v. Artuz, 254 F.3d 374 (2d Cir. 2001) 20, 24, 25

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 7, 11, 13, 14

FEDERAL STATUTES

28 U.S.C.
§ 2241 13
§ 2244 ..... *passim*
§ 2254 24
§ 2255 ..... 15, 25, 29, 30

TABLE OF AUTHORITIES – Continued

Page

§§ 2261-2266 8

§ 2263 ..... 8, 15, 16

MISCELLANEOUS

141 Cong. Rec.
S7597 (daily ed. May 26, 1995) 17
S7805 (daily ed. June 7, 1995) 17
S7838 (daily ed. June 7, 1995) 17
S7840 (daily ed. June 7, 1995) 17

142 Cong. Rec.
H3606 (daily ed. Apr. 18, 1996) 17
S3472 (daily ed. Apr. 17, 1996) 17

Sup. Ct. R.
37 1

INTEREST OF *AMICI CURIAE*

Amici are federal public defender offices and community defender organizations for judicial districts in the Ninth Circuit. *Amici* are often appointed as counsel in federal habeas corpus proceedings brought on behalf of indigent prisoners in state custody. The issues raised in this Court and the proceeding below are exceedingly important to *amici*, because they impact whether many prisoners will ever obtain federal merits review of their habeas claims.[1]

STATEMENT OF THE CASE

This case reflects the tension between the twin commands that habeas corpus petitioners (1) present all of their claims in state court before filing them in federal court (the "exhaustion requirement"), and (2) file all of their claims in federal court within the one-year limitation period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). The exhaustion requirement is a longstanding part of habeas law. In *Rose v. Lundy*, 455 U.S. 509, 510 (1982), this Court held that district courts must dismiss petitions containing both exhausted and unexhausted claims ("mixed petitions"), "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the office of the Federal Public Defender for the Central District of California, made any monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6. Respondent has consented to the filing of this brief, and Respondent's letter of consent has been lodged with the Clerk of the Court. Petitioner has not consented to the filing of this brief, and therefore *amici* have filed a motion for leave to file the brief. Sup. Ct. R. 37.3.

On April 24, 1996, AEDPA was enacted, imposing for the first time a one-year statute of limitations on the filing of federal habeas petitions. AEDPA's limitation period is tolled during the time a properly filed state habeas petition is pending, but not while a federal petition is pending. 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). This case presents the scenario noted by several Justices in *Duncan*: that the statute of limitations can run while a timely filed but mixed petition is pending in district court, and before the court grants a motion to dismiss the petition for failure to exhaust state remedies. In such situations, absent equitable tolling, a stay of the exhausted claims, or some other mechanism, if the petitioner exercises his right under *Rose* to leave federal court, exhaust state remedies and refile a federal petition, he is barred from returning to federal court and litigating his claims by the statute of limitations. This is what happened to Respondent Richard Herman Ford ("Ford") in the district court.

In 1988, Ford was convicted in two separate state court actions of first degree murder and conspiracy to commit murder (the "*Weed*" case) and conspiracy to commit murder and attempted murder (the "*Loguercio*" case). Pet. App. A-16, A-18.[2] He was sentenced to life without the possibility of parole in *Weed*, and 36 years to life in *Loguercio*. *Id.* Both judgments were affirmed on appeal and both became final in 1993. *Id.* at A-16, A-19.

On April 24, 1996, AEDPA became effective. Under AEDPA's one-year statute of limitations, Ford was required to file any federal habeas petitions by April 24, 1997, within one year of AEDPA's enactment. Pet. App. A-21; 28 U.S.C. § 2244(d)(1). On April 19, 1997, Ford timely submitted *pro se* petitions challenging his judgments in both cases (the "first petitions"). Pet. App. A-16, A-19. Ford concurrently filed motions to stay the actions

[2] "Pet App." refers to the appendix filed with the petition for writ of certiorari.

on his exhausted claims while he presented any unexhausted claims in state court. *Id.* at A-14.

The State asserted that Ford had failed to exhaust state remedies. Pet. App. D-1, E-2. The magistrate judge found that some, though not all, of Ford's claims in each case were unexhausted, and gave Ford two options. "Petitioner was given the choice between dismissing the Petition without prejudice to refiling after exhaustion of the unexhausted grounds or proceeding on only the exhausted claims." Pet. App. D-1, D-2, E-2; *see also* Jt. App.[3] 51 (magistrate informs Ford that if he dismisses petition to exhaust state remedies, and relief is denied in state court, "a new Petition may be filed with this Court containing only those issues that have been fully exhausted"); *Id.* at 71 (same advice given in companion case). The magistrate did not inform Ford that AEDPA's limitation period had run about four months earlier while the first petitions were pending and that, as a result, a dismissal purportedly "without prejudice" would leave him unable to refile any claims in federal court, and effectively terminate his right to federal habeas review. Pet. App. A-14. The magistrate also recommended that the stay requests be denied on the ground that the court could not stay a mixed petition. Jt. App. 52-53, 82.

Ford opted to dismiss both petitions without prejudice to exhaust claims, and the magistrate recommended dismissal without prejudice. Pet. App. A-14, D-2, E-2. The district court adopted all of the magistrate's recommendations in each case. The *Weed* petition was dismissed without prejudice on October 14, 1997, and the *Loguercio* petition was dismissed on September 11, 1997. *Id.* at A-17, A-20.

After the dismissals, Ford promptly presented his unexhausted claims to state court. On September 29, 1997, 18 days after dismissal, Ford filed a state petition with the California Supreme Court seeking relief in the

[3] "Jt. App." refers to the joint appendix filed by the parties.

Loguercio case. Pet. App. A-17. On October 24, ten days after dismissal of the *Weed* petition, Ford submitted a state habeas petition in that case. *Id.* at A-20. On March 25, 1998, the California Supreme Court summarily denied both petitions. *Id.* at A-17, A-18, A-20.

One week later, on April 1, 1998, Ford refiled federal petitions in both cases (the "second petitions"). Jt. App. 84, 103, 105, 120. The State moved to dismiss on the ground that the second petitions were untimely. Pet. App. A-18, A-20, A-21. Ford argued that he had diligently litigated his state petitions and filed his second petitions in reliance on the court's statements that the dismissals "without prejudice" would allow him to return to federal court after exhausting his claims. *See id.* at B-4, C-4. The district court dismissed the second petitions with prejudice as time barred, and Ford never received federal merits review of any of his claims, including the dozen or more exhausted claims that were timely filed in the initial petitions. *Id.* at A-18, A-21; Jt. App. 35-46, 50, 59-72, 80, 84-120.

The Ninth Circuit reversed. The court held that the dismissals of the initial petitions had been improper. Pet. App. A-15. Ford's decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one," the court reasoned, because the magistrate failed to inform him of AEDPA's statute of limitations, and of his option under settled Ninth Circuit law to withdraw his unexhausted claims and seek a stay of the exhausted claims. *Id.* The court further held that because the dismissals were improper, Ford could claim the timely filing date of the first petitions and "relate back" to that date claims raised in the first petitions and reasserted in the second. *Id.* at A-31.

In a footnote, the Ninth Circuit stated that "[a]lthough [it] need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Pet. App. A-35. The court reasoned that "[t]he district court's error in failing properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal

of his petitions were 'extraordinary circumstances' beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations." *Id.* The court reiterated, however, that because it granted relief to Ford on other grounds, it was not resolving "any equitable tolling claim here." *Id.*

Amici submit this brief in the event that the Court decides to consider the equitable tolling issue, or to announce standards for considering tolling claims under AEDPA.

SUMMARY OF ARGUMENT

Equitable tolling is a flexible doctrine that permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity. Although this Court has not ruled whether AEDPA's one-year limitation period may be equitably tolled, it has repeatedly held that limitation periods in federal statutes are presumptively subject to equitable tolling. The overwhelming consensus among the federal Courts of Appeals is that AEDPA's one-year period of limitation may be equitably tolled in appropriate cases. Equitable tolling of AEDPA's limitation period is consistent with this Court's case law, and with the text, structure, purpose and legislative history of AEDPA. Equitable tolling is appropriate where, as here, the petitioner has diligently pursued relief but, due to external circumstances, has been unable to timely file his claims. The situation presented here – the statute of limitations expiring before the district court dismisses a timely filed, *pro se* petition because it contains unexhausted claims – is an all too common occurrence that has eviscerated the right to federal habeas review for many prisoners. The lower courts should be permitted to continue to use equitable tolling to preserve prisoners' federal habeas rights in appropriate circumstances. Tolling is particularly appropriate where, as here, a *pro se* petitioner's right under *Rose* to resubmit a federal petition after exhausting state

remedies is threatened by AEDPA's one-year limitation period. *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) ("the complete exhaustion rule is not to 'trap the unwary *pro se* prisoner' ").

ARGUMENT

I.

AEDPA'S "1-YEAR PERIOD OF LIMITATION" IS A STATUTE OF LIMITATION SUBJECT TO EQUITABLE TOLLING

A. Introduction

The doctrine of equitable tolling permits a court to deem a late filed action timely when " 'principles of equity would make the rigid application of a limitation period unfair.' " *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998). In such cases, the policy of repose reflected in limitations periods, designed to protect defendants, is outweighed by "the interests of justice [that] require vindication of the plaintiff's rights." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965).

Equitable tolling is a longstanding and widespread practice, and limitations periods in federal statutes are presumptively subject to tolling unless tolling would be inconsistent with Congressional intent. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *Bowen v. City of New York*, 476 U.S. 467, 480 (1986). In deciding whether equitable tolling is available under a particular statute, courts often phrase the issue as whether the time limitation constitutes or is analogous to a statute of limitations, in which case tolling is available; or whether the limitation is a jurisdictional prerequisite to filing a claim, in which case tolling is unavailable and non-compliance with the deadline forever bars the claim. *See*,

e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-93 (1982).

As shown below, and as ten Circuit Courts of Appeals have concluded, AEDPA's one-year period of limitation is a statute of limitation that is subject to equitable tolling.

B. The Statutory Language

The limitation period applicable to the case at bar is contained in 28 U.S.C. § 2244(d). That provision states:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

counted toward any period of limitation under this subsection.[4]

C. Justice Stevens' Concurring Opinion in *Duncan v. Walker* Recognizes the Availability of Equitable Tolling under AEDPA

In *Duncan v. Walker*, 533 U.S. 167, this Court held that a federal habeas corpus petition is not an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), and therefore AEDPA's one-year limitation period is not statutorily tolled during the time a federal petition is pending. Walker had timely filed a *pro se* habeas petition challenging his state robbery conviction, but the petition was dismissed without prejudice because it was not apparent that Walker had exhausted state remedies. 533 U.S. at 169-70. By the time Walker refiled a federal petition, the one-year limitation period had expired. *Id.* at 170. The district court dismissed the petition as time barred, but the Second Circuit reinstated it on the theory that the limitation period was tolled during the time the initial federal petition was pending (about three months). *Id.* at 170-71.

In reversing the Second Circuit, the *Duncan* majority stated that it had no occasion to address the question of the availability of equitable tolling in light of the facts (1) that Walker had more than nine months remaining in the limitation period when the district court dismissed his initial petition without prejudice; and (2) that Walker never returned to state court, but instead filed another federal petition about 10 months later, asserting claims

[4] AEDPA also contains a 180-day limitation period that is not applicable here, 28 U.S.C. § 2263(a). That provision applies solely to habeas corpus petitions filed by capital prisoners in the custody of states that have implemented special qualifying provisions relating to the appointment, compensation, and standards of competency of state postconviction counsel. 28 U.S.C. §§ 2261-2266 (Chapter 154 of 28 U.S.C.); *Calderon v. Ashmus*, 523 U.S. 740, 742-43 (1998).

different from those presented in his initial filing. 533 U.S. at 170, 181.

In an opinion concurring in part and concurring in the judgment, Justice Stevens, joined by Justice Souter, made "two observations regarding the equitable powers of the federal courts" to avoid the harsh consequences of the one-year limitation period and preserve federal review, powers that remain unaffected by the majority's "limited holding." 533 U.S. at 182-84. First, Justice Stevens encouraged district courts confronted with mixed petitions to retain jurisdiction and stay the federal habeas action pending the exhaustion of state remedies. *Id.* at 182-83.

Second, Justice Stevens emphasized that federal courts may equitably toll the limitation period in appropriate cases. 533 U.S. at 183. "[N]either the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled" during the time a mixed petition is pending "as a matter of equity." *Id.* After *Duncan*, "a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA." *Id.* Moreover, "federal courts may well conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." *Id.* at 183-84 (footnote omitted). In such cases, equitable tolling during the pendency of unexhausted federal petitions may be appropriate and is not precluded by the majority's limited holding. *Id.* at 184 & n.3.

Justice Stevens and Justice Breyer (in his separate dissent, joined by Justice Ginsburg) noted a study showing that district courts on average take 268 days to dismiss petitions on procedural grounds, leaving petitioners with little, if any, time to exhaust state remedies and refile a federal petition. 533 U.S. at 184 (Stevens, J.,

concurring); *id.* at 186 (Breyer, J., dissenting). Justice Breyer noted that 93% of habeas petitioners represent themselves *pro se*. 533 U.S. at 191. Justice Stevens explained that "[t]he question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law . . . but also for district courts." *Id.* at 184 n.2; *see also id.* at 191 (Breyer, J., dissenting).

D. As Ten Circuit Courts of Appeals Have Concluded, AEDPA's One-Year Limitation Period Is Subject to Equitable Tolling

Ten Circuit Courts of Appeals have held that equitable tolling is available in cases challenging state court judgments under AEDPA. *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 651-52 (6th Cir. 2002); *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003); *Flanders v. Graves*, 299 F.3d 974, 976 (8th Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003); *Drew v. Department of Corrections*, 297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied sub nom. Drew v. Crosby*, 537 U.S. 1237 (2003); *Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller,* 145 F.3d at 617-19 (3d Cir. 1998); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997); *see also Dunlap v. United States*, 250 F.3d 1001, 1004 n.1 (6th Cir. 2001) ("Every circuit that has decided this issue has held that the one-year limitation period under § 2255 (or § 2244) is a statute of limitations, subject to the doctrine of equitable tolling, rather than a jurisdictional requirement").

The First Circuit has at different times assumed that equitable tolling is available or stated that it has not resolved the issue, and it has remanded cases to district court to consider equitable tolling claims. *David v. Hall*, 318 F.3d 343, 346 (1st Cir.), *cert. denied*, 124 S. Ct. 66 (2003); *Neverson v. Bissonnette*, 261 F.3d 120, 127 (1st Cir. 2001).

The consensus in the lower courts that AEDPA's one-year limitation provision is subject to equitable tolling is consistent with this Court's decisions, and the language, structure, purpose and legislative history of AEDPA.

1. Limitations Periods in Federal Statutes Are Presumptively Subject to Equitable Tolling, and This Court Has Found Equitable Tolling Available in Numerous Contexts

This Court has repeatedly affirmed its "understanding that federal statutes of limitations are generally subject to equitable principles of tolling." *Rotella v. Wood*, 528 U.S. 549, 561 (2000); *Young v. United States*, 535 U.S. 43, 49-50 (2002) ("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling"' . . . unless tolling would be 'inconsistent with the text of the relevant statute. . . .' Congress must be presumed to draft limitations periods in light of this background principle.").

The availability of equitable tolling was settled law as long ago as the 1860s. *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 223 (1869); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974) ("In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground."). The presumption in favor of the availability of equitable tolling is so strong that even statutes waiving sovereign immunity are held to incorporate tolling. *Irwin*, 498 U.S. at 95-96 ("the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States").

Applying these principles, this Court has held that the time limits for filing claims in numerous and diverse federal statutes are subject to equitable tolling. *See, e.g.*, *Young*, 535 U.S. 43 (three-year lookback period allowing IRS to collect taxes against debtor is equitably tolled during pendency of debtor's earlier Chapter 13 proceeding); *Zipes*, 455 U.S. at 393 ("filing a timely charge of

discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling") (footnote omitted); *Burnett*, 380 U.S. at 428 ("when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action").

In *Irwin*, this Court summarized its equitable tolling holdings. The Court explained:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

498 U.S. at 96 (footnotes omitted).

This Court has recognized that equitable tolling is appropriate in other cases, as well, including when the claimant has received inadequate notice; when a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; when the court has led the plaintiff to believe that she had done everything required of her; or when affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Young*, 535 U.S. at 50.

2. Equitable Tolling Is Consistent with AEDPA's Language, Structure, Purpose and Legislative History

As Judge Kozinski reasoned in the first Court of Appeals case to consider the issue, "[e]very relevant signal – from the Act's plain language, to its legislative history, to its structure – points in the same direction: [AEDPA's] one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar." *Beeler*, 128 F.3d at 1289.

"A plain reading of the language of § 2244 . . . leads to the conclusion that Congress intended that the limitations period be interpreted as a statute of limitations." *Davis*, 158 F.3d at 811. *Beeler* observed that, unlike other parts of AEDPA, the one-year limitation provision in § 2244(d)(1) is "remarkably lucid. It is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" 128 F.3d at 1288 (*quoting Zipes*, 455 U.S. at 394); *Miller*, 145 F.3d at 618 (emphasizing that "§ 2244(d)(1) refers to the one year as a 'period of limitation' and a 'limitation period,' and does not use the term 'jurisdiction'"); *Davis*, 158 F.3d at 811 ("§ 2244(d)(1) states only that 'a 1-year period of limitation shall apply' and does not contain any restrictive language that would imply a limit on federal court jurisdiction").

"This interpretation of § 2244(d)(1) is consistent with a plain reading of AEDPA's placement within the federal habeas statute." *Davis*, 158 F.3d at 811. As the Fifth Circuit has explained:

> When Congress amended the habeas corpus provisions by enacting AEDPA, it took care to separate jurisdiction provisions from this limitations-period provision. The explicit grant of jurisdiction to the district courts relating to the habeas writ is contained in 28 U.S.C. § 2241. Congress

> chose to insert the AEDPA limitation amendment into § 2244, which concerns the finality of determinations and contains provisions relating to non-jurisdictional limitations, such as restraints on duplicative and frivolous litigation. This plain reading of the statute as a whole implies that Congress did not intend by its choice of language and placement to limit federal jurisdiction through adoption of a one-year limitations period for federal habeas claims.

Id.; *Miller*, 145 F.3d at 618 ("the statute affirmatively separates the time limitation provision from the section that deals with jurisdiction," and "the provision in which Congress explicitly grants jurisdiction to the district courts . . . does not reference the timely-filing requirement"); *Beeler*, 128 F.3d at 1288 (similar); *compare Zipes*, 455 U.S. at 393-94 (absence of reference to jurisdiction in Title VII filing requirement provision and absence of reference to timely filing in jurisdiction provision support conclusion that Title VII filing deadline is subject to equitable tolling).

Moreover, as *Beeler* emphasized, this Court has "repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling." 128 F.3d at 1288. For example, this Court held that equitable tolling is available where the statute mandated that "'no action shall be maintained . . . unless commenced within three years from the day the cause of action accrued.'" *Burnett*, 380 U.S. at 425; *Beeler*, 128 F.3d at 1288.

That section 2244(d) contains several express tolling provisions does not imply that equitable tolling is precluded. Section 2244(d)(1)(A)-(D) lists various triggering events for the commencement of the limitation period, and § 2244(d)(2) provides that the limitation period is tolled during the time a properly filed application for state post-conviction relief is pending. *See supra* at 7-8. In *Harris*, the Fourth Circuit persuasively rejected the argument that these explicit exceptions to the one-year limitation

period indicate that Congress intended to foreclose any other exceptions. 209 F.3d at 329. The court reasoned that the argument

> reads too much into any negative inference that may reasonably be drawn from the exceptions. The exceptions in § 2244(d)(1)(B)-(D) simply make the writ available to address later arising circumstances, while the exception in § 2244(d)(2) ensures that state post-conviction review will be allowed to proceed on course. Without these exceptions, a petitioner could inappropriately be denied the writ altogether, "risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 [] (1996). The inclusion of these statutory provisions does not give rise to the inference that the application of the limitation period must otherwise be absolute, as might be the case if the period were jurisdictional.

Id.; *Young*, 535 U.S. at 52-53 (holding that three-year lookback provision allowing IRS to collect taxes against debtor was tolled during pendency of Chapter 13 proceeding, and refusing to draw "negative inference" from presence of explicit tolling provision elsewhere in the statute).

To the contrary, as the Third Circuit concluded in *Miller*, the provision of a "fraudulent concealment" exception in § 2244(d)(1)(B) and a "discovery rule" in § 2244(d)(1)(D) shows "'that the drafters envisioned the provision to function as a typical statute of limitations, rather than a jurisdictional limitation.'" 145 F.3d at 618; *Young*, 535 U.S. at 53 (express tolling provision in Bankruptcy Code incorporating traditional equitable principles supplements rather than displaces principles of equitable tolling).

The provision of a 30-day tolling provision in a separate part of AEDPA, 28 U.S.C. § 2263(b)(3), does not alter the conclusion that the one-year provision of § 2244(d) is subject to equitable tolling. Section 2263 is part of Chapter 154 of AEDPA, which applies solely to habeas corpus petitions filed by capital prisoners in the custody of states

(known as "opt-in states") that have implemented special qualifying procedures relating to the provision of state postconviction counsel. *See supra* at 8 n.2. Chapter 154 provides for expedited review in actions brought against opt-in states, and imposes a 180-day limitation period for filing a federal habeas petition in such cases. 28 U.S.C. § 2263(a); *Ashmus*, 523 U.S. at 742. Section 2263(b)(3)(B) states that "[t]he [180-day] time requirements established [for capital cases from opt-in states] shall be tolled . . . during an additional period not to exceed 30 days, if . . . a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section."

Beeler rejected the argument that the 30-day tolling provision in Chapter 154 cases indicates that equitable tolling is unavailable under the one-year limitation provision in other cases. The court emphasized that "[t]he Supreme Court has cautioned against using this kind of negative inferential reasoning, because such 'excursions into extrapolation of legislative intent' are most often 'entirely unilluminating.'" 128 F.3d at 1289 (*quoting Cort v. Ash*, 422 U.S. 66, 83 n.14 (1975)). The court reasoned that "the more reasonable inference to be drawn from Congress's inclusion of a 30-day tolling limit in [Chapter 154] runs contrary to that proffered by [the argument's proponent]." *Id.* The court noted that "[s]tatutes of limitation are presumptively subject to equitable tolling," citing this Court's decisions. *Id.* The court concluded that the "30-day tolling limit was therefore probably designed to cap what would have otherwise been an unlimited tolling period. Because [§ 2254(d)] contains no similar restriction, we can infer that Congress did not intend to upset the normal default rule allowing longer tolling periods." *Id.*; *Davis*, 158 F.3d at 811 (noting that § 2244(d)'s "limitation period does not establish an absolute outside limit within which suits must be filed").

Beeler also correctly concluded that "AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity" that the one-year provision is a statute of limitation rather than a jurisdictional bar. 128

F.3d at 1288. Neither the conference report, nor any statements of Senators or Representatives, describe the one-year limitation as a restriction on federal court jurisdiction. *Id.*; *Miller*, 145 F.3d at 618.

By contrast, many members of Congress, including AEDPA's authors in the Senate and its sponsors in the House, describe the provision as a "'statute of limitations.'" *Beeler*, 128 F.3d at 1288. For example, before AEDPA was enacted, Senator Hatch stated that under current law, there is no "statute of limitations" on filing habeas petitions. 141 Cong. Rec. S7805 (daily ed. June 7, 1995). In contrast, he explained, the new legislation will "have [a] 1-year statute of limitations." 141 Cong. Rec. S7597 (daily ed. May 26, 1995). Senator Spector stated that he "introduced [the AEDPA] legislation . . . to impose a statute of limitations on the filing of habeas corpus petitions." 142 Cong. Rec. S3472 (daily ed. Apr. 17, 1996). In considering AEDPA, Senator Cohen stated, "I support a statute of limitations for filing habeas petitions." 141 Cong. Rec. S7838 (daily ed. June 7, 1995). Senator Biden added, "I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations. . . ." *Id.* at S7840. And after AEDPA was passed, Representative Hyde stated, "[n]ow, we have a 1-year statute of limitations in habeas." 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996); *see generally Beeler*, 128 F.3d at 1288; *Miller*, 145 F.3d at 618.

Construing § 2244(d)(1) as a statute of limitations subject to equitable tolling is also consistent with AEDPA's statutory purpose of curbing the abuse of the writ of habeas corpus. *Miller*, 145 F.3d at 618. A one-year statute of limitation "will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances." *Id.*; *Beeler*, 128 F.3d at 1288 (construing § 2244(d) as a statute of limitations serves AEDPA's goal of reducing "unacceptable delay" in the federal habeas process "quite well; not as well as a strict jurisdictional bar to be sure, but [the] time-limit will doubtless speed up the habeas process considerably").

The development of the case law since *Beeler* and other cases recognizing equitable tolling under AEDPA confirms the accuracy of *Beeler*'s prediction that "district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." *Beeler*, 128 F.3d at 1289; *see, e.g.*, *Burger*, 317 F.3d at 1141 ("we have limited equitable tolling of the one-year limitations period to 'rare and exceptional' circumstances"); *Wilson*, 302 F.3d at 748-49 ("'[e]quitable tolling is granted sparingly'"); *compare Irwin*, 498 U.S. at 96 ("[f]ederal courts have typically extended equitable relief only sparingly").

II.

FACTORS GUIDING ANALYSES OF EQUITABLE TOLLING CLAIMS UNDER AEDPA

If the Court is inclined to consider the question whether equitable tolling applies in the case at bar, *amici* respectfully suggest that the Court remand the case for resolution of this highly fact-based question. The Court's order granting certiorari does not include the equitable tolling issue, and a lower court would be in a better position to review the complete record relevant to deciding whether tolling applies.

This approach is supported by *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193, 196 (1997). In *Klehr*, the Court declined to "go beyond the writ's question to reexamine the fact-based rule-application issue[s]" of whether the Eighth Circuit had properly determined when plaintiffs should have reasonably discovered their claim and whether they were diligent in pursuing their claim. 521 U.S. at 193-96. The Court had granted certiorari on the legal questions of (1) the date upon which a civil action accrues under the Rackateer Influenced and Corrupt Organization Act ("RICO"); and (2) whether a plaintiff alleging that his late-filed RICO claim was fraudulently concealed, and therefore should be deemed timely, must be reasonably diligent in trying to discover his cause of action. *Id.* at 182, 194. The Court refused to review the Eighth Circuit's "highly fact based" conclusions on the discovery and due diligence questions, emphasizing that "[d]oing so would involve examining an evidentiary record of several thousand pages" and exceed the scope of the writ. *Id.* at 193, 196. In the instant appeal, the Court has not granted certiorari on the equitable tolling issue, and the lower court is in a better position to review the record necessary to decide the issue in the first instance.

If the Court decides the equitable tolling issue in the present appeal, or remands the issue for a decision below, the lower courts may well benefit from the Court's guidance on factors to consider in deciding equitable tolling claims under AEDPA. Of course, by its very nature, "[e]quity eschews mechanical rules" and "depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). "As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules . . . ." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). Nevertheless, the lower courts' equitable tolling cases under AEDPA, and this Court's equitable tolling cases in other contexts, identify several factors that should inform an equitable tolling analysis.

Of the Courts of Appeals to consider equitable tolling under AEDPA, the Sixth Circuit has probably articulated the most detailed and specific test. The Sixth Circuit has "identified five factors to consider when determining the appropriateness of equitably tolling a statute of limitations":

> (1) the habeas petitioner's lack of notice of the filing requirement;
>
> (2) the petitioner's lack of constructive knowledge of the filing requirement;
>
> (3) the petitioner's diligence in pursuing his rights;
>
> (4) the absence of prejudice to the respondent; and

(5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Dunlap, 250 F.3d at 1008.

The factors identified in the Sixth Circuit's balancing test are consistent with this Court's case law, which recognizes that equitable tolling is appropriate when the claimant has received inadequate notice so long as he has acted with reasonable diligence during the statutory period. *See supra* at 11-12; *Irwin*, 498 U.S. at 96.

The Sixth Circuit test also rightly considers the petitioner's lack of notice and knowledge about filing requirements, and his reasonableness in remaining ignorant of them. Although ignorance of the law may be no excuse in some contexts, it is a valid consideration in determining whether a *pro se* inmate's late-filed habeas petition should be deemed timely, particularly given that AEDPA's one-year limitation period marks such a radical departure from prior habeas law, and that many prisons' law libraries did not make AEDPA available until long after its enactment. *Zarvela v. Artuz*, 254 F.3d 374, 379 (2d Cir. 2001) (in AEDPA, "Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions"); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000) (en banc) (per curiam) (remanding case to determine propriety of equitable tolling based on prisoner's declaration that prison law library did not have materials describing AEDPA until after one-year period had run in his case). It is also a factor that may vary from case to case.

In *Dunlap*, the Sixth Circuit found the foregoing five-factor test preferable to the "extraordinary circumstances" test applied by the Ninth Circuit in *Beeler* and used by some other Circuits. 250 F.3d at 1008-09. *Beeler* stated that equitable tolling "will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it *impossible* to file a petition on time." 128 F.3d at 1288 (emphasis added). The Sixth Circuit was correct to reject the *Beeler* test, because its draconian mandate that

equitable tolling be denied unless events make it "impossible" to file a timely petition has no basis in AEDPA or this Court's equitable tolling law.

Amici are unaware of any holding by this Court conditioning a grant of equitable tolling on the showing that the timely filing of a claim was "impossible." An impossibility requirement is inconsistent with the cases where the Court has found equitable tolling to be proper, *e.g.*, where the plaintiff actively pursued his judicial remedies by filing a defective pleading during the statutory period; the plaintiff received inadequate notice; or when the court led the plaintiff to believe that she had done everything required of her. In none of those situations was a timely filing "impossible." Rather, tolling was proper because although the plaintiff diligently pursued relief, he did not timely file his claims because of some action or circumstance external to him.

Cases outside the Ninth Circuit have not imposed an impossibility standard. *See, e.g., Warren*, 219 F.3d at 113 ("In the context of a late-filed habeas petition, equitable tolling may sometimes offer an avenue for avoiding Suspension Clause issues in the 'rare case' where strict application of the one year limitations period would create 'an *unreasonable* burden.'") (emphasis in original); *Miller*, 145 F.3d at 618 (Equitable tolling is proper when the "'principles of equity would make the rigid application of a limitation period unfair.' . . . Generally, this will occur when the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.'") (citations omitted). Even the Ninth Circuit has framed AEDPA tolling questions without imposing an impossibility requirement. *See, e.g., Tillema v. Long*, 253 F.3d 494, 504 (9th Cir. 2001) ("'when external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute may be appropriate'").

Further, an examination of the Ninth Circuit's habeas decisions quoting the impossibility test and permitting equitable tolling reveals that it was not in fact "impossible" for the petitions in some of those cases to have been

timely filed. For example, in *Beeler*, the court-appointed attorneys for a capital petitioner were ordered to file a habeas petition by March 25, 1997, but at some point (unspecified in the opinion), the lead attorney accepted employment out of state and was permitted to withdraw. The second attorney was promoted to lead counsel and another attorney was appointed as second chair. On February 3, 1997, these attorneys asked the district court in advance to equitably toll the statute, which it did, giving them, in effect, an extension until October 13, 1997 to file the petition. The Ninth Circuit affirmed and, although it quoted the "impossib[ility]" language, its holding simply noted that "much of the work product [the departing attorney] left behind was not usable by replacement counsel – a turn of events over which Beeler had no control." 128 F.3d at 1288. Surely, it was not *impossible* for two experienced capital attorneys to file a habeas corpus petition on any date earlier than October 13, 1997.

The impossibility test cited in *Beeler* was first framed by the district court in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987). In *Forti*, the district judge stated that federal courts applied a theory of equitable tolling "similar to an 'impossibility' doctrine," citing two cases: one holding that plaintiff's internment by Japan during World War II tolled the limitation period on his Jones Act claim (*Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947)); and the other holding that the Civil War tolled the limitation period for a breach of contract claim. (*Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867)). *Id.*

Neither of those cases, however, uses the term "impossible," nor did those courts purport to limit tolling only to circumstances arising out of the cataclysmic upheavals caused by war. In *Forti* itself, where the plaintiffs were seeking damages for injuries sustained during Argentina's "dirty war" of the mid-1970's, the court denied a motion to dismiss on limitations grounds, holding that plaintiffs might be able to prove that they were unable to gain effective access to Argentina courts during the limitations period, and therefore were entitled to tolling. 672 F. Supp.

at 1550. Thus, the court's actual holding belies its framing of the test in terms of "impossibility."

In sum, under this Court's case law, federal courts have the discretion to grant equitable tolling on a case-by-case basis to avoid inequity, whether events have made a timely filing "impossible" or merely unreasonably burdensome. Because equitable tolling is a flexible, discretionary doctrine, it is not possible to catalog all of the scenarios in which tolling is proper, but it is undeniably appropriate where, despite his diligent efforts, a petitioner has been unable to timely file his claims because of extraordinary or external circumstances; he has filed a defective pleading within the statutory period; or he has done everything a court has led him to believe is required of him.

III.

FORD IS ENTITLED TO EQUITABLE TOLLING

Under the foregoing standards, Ford is entitled to equitable tolling, and the Court should so hold if it reaches the issue. Equitable tolling is necessary to vindicate Ford's rights under *Rose v. Lundy*, 455 U.S. 509, and is consistent with this Court's equitable tolling jurisprudence, Justice Stevens' concurring opinion in *Duncan*, and AEDPA tolling cases in the Courts of Appeals.

In *Rose*, this Court held that district courts must dismiss mixed petitions but also must "leav[e] the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510; *Slack*, 529 U.S. at 486 ("*Rose v. Lundy* held that a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims. The opinion, however, *contemplated that the prisoner could return to federal court after the requisite exhaustion.*") (emphasis added).

When *Rose* was decided, there was no statute of limitations in habeas cases. As the Ninth Circuit has explained:

> Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners . . . may find themselves time-barred when they attempt to resubmit their exhausted claims to the district court.

Anthony v. Cambra, 236 F.3d 568, 573 (9th Cir. 2000); *Zarvela*, 254 F.3d at 377 (*Rose*'s "direction was given before Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions"); *Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 79 (1st Cir. 2002) ("When *Rose* was decided, there was no time limit on petitions filed under § 2254. Thus, there was little cost to a dismissal without prejudice – the state prisoner could refile the petition at any time following exhaustion of his federal claims. AEDPA changed matters.").

In the case at bar, Ford diligently filed his initial petitions within AEDPA's one-year limitation period, as applied to petitioners whose convictions became final before AEDPA was enacted (i.e., by April 24, 1997, one year after AEDPA became law). Although the one-year statute applied, the district court suggested that dismissing the petitions was inconsequential, stating in its dismissal orders that dismissal "was without prejudice to refiling after exhaustion of the unexhausted grounds. . . ." However, because the statute of limitations had expired while Ford's first petitions were pending – over four months before the dismissal orders were issued – it was impossible for Ford to refile a timely federal petition after exhausting state remedies.

The district court never advised Ford of AEDPA's one-year limitation period or how the period applied to his petitions. *See Castro v. United States*, 124 S. Ct. 786, 792-93 (2003) (to enable *pro se* inmates to make informed

judgments about how to litigate their claims under AEDPA, a district court cannot recharacterize a federal inmate's motion as a 28 U.S.C. § 2255 motion unless it informs the inmate of its intent to recharacterize, warns that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides an opportunity to withdraw or amend the filing).

Nor did the court inform Ford that if he dismissed his unexhausted claims and renewed his stay requests, the court could stay his petitions pending the exhaustion of state remedies. *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir.) ("the district court must consider the alternative of staying the petition after dismissal of unexhausted claims, in order to permit [p]etitioner to exhaust those claims and then add them by amendment to his stayed federal petition"; "we join the 'growing consensus' in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited"), *cert. denied*, 123 S. Ct. 2094 (2003); *Zarvela*, 254 F.3d at 380 (a stay "will be the only appropriate course" where outright dismissal could jeopardize the timeliness of any subsequent petition); *Delaney v. Matesanz*, 264 F.3d 7, 14, n.5 (1st Cir. 2001) (recommending stays "in instances in which the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely").

The court misled Ford by informing him that if he opted to dismiss the first petitions to exhaust claims in state court, the dismissals would be "without prejudice." *Tillema*, 253 F.3d at 503-04 (because limitations period expired before court dismissed petition for failure to exhaust, "the district court's erroneous dismissal . . . literally and immediately extinguished [petitioner's] right to federal habeas review . . . [and] it cannot accurately be said that the dismissal of [the] petition was, as the court's order stated, 'without prejudice' ").

The court's misleading statements, and its failure to advise Ford of AEDPA's statute of limitations and his right

to seek a stay of fully exhausted petitions, deprived Ford of a meaningful opportunity to exercise his rights under *Rose*. Equitable tolling is necessary to preserve Ford's right under *Rose* to "return to federal court after the requisite exhaustion" and obtain, for the first time, federal court review of the merits of his habeas claims. *Lonchar*, 517 U.S. at 330 ("the interest in permitting federal habeas review of a first petition is quite strong"); *Slack*, 529 U.S. at 487 ("A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition."); *Tillema*, 253 F.3d at 504 ("[H]ad the district court followed the law, *i.e.*, *Rose v. Lundy*, Tillema would have been permitted to proceed with all but one of his claims; because the district court erred, Tillema lost all opportunity for federal review of all of his claims. We therefore hold that Tillema is 'entitled to the benefit of the equitable tolling of the statute of limitations.'") (footnote and citation omitted).

Granting Ford equitable tolling is also consistent with Justice Stevens' concurring opinion in *Duncan*. Ford "invoke[d] the [federal] court's jurisdiction within the 1-year interval prescribed by AEDPA." 533 U.S. at 183. Unlike the habeas petitioner in *Duncan*, but consistent with the scenario presented in Justice Stevens' concurrence, AEDPA's limitation period expired while Ford's first petitions were pending and before the court granted the State's motions to dismiss for failure to exhaust. Also unlike the habeas petitioner in *Duncan*, after his first petitions were dismissed Ford promptly filed petitions in state court to exhaust claims, and then quickly refiled federal petitions after his state petitions were denied.

On similar facts, the Tenth Circuit granted equitable tolling in *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003). The court explained that "York's timeliness problem is that the one-year limitations period was not tolled during the time his second federal habeas petition was pending." *Id.* at 527. The district court dismissed the second petition for failure to exhaust state remedies, and when York returned

to federal court to refile a petition after exhaustion, the petition was dismissed as time barred. *Id.* at 524-26. The Tenth Circuit noted that:

> [i]n *Duncan* . . . the very case that created the 'no tolling' rule for prior federal habeas petitions, concurring justices of the Supreme Court recognized that the rule might pose problems for petitioners, like York, whose prior petitions had been dismissed in order to exhaust state remedies. . . . These justices suggested that a federal court might apply equitable tolling to relieve a petitioner of the consequences of the rule.

Id. at 527 (citations omitted). The court concluded that the district court should have applied equitable tolling to render York's third petition timely, and remanded the case for consideration of the merits of the petition. *Id.* at 528.

The case at bar is an even stronger case for tolling than *York*, because when York's second petition was dismissed for failure to exhaust, he still had 11 days remaining in the limitations period to try to exhaust his claims and return to federal court. 314 F.3d at 526. Here, by contrast, the statute had expired four months before the court dismissed Ford's petitions, making it impossible for him to timely refile.

Equitable tolling is also required under this Court's equitable tolling jurisprudence, which authorizes tolling "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96 (describing holding in *Burnett*, 380 U.S. 424). In *Burnett*, a railroad employee asserting a claim under the Federal Employers' Liability Act ("FELA") filed suit in state court (which had concurrent jurisdiction) within FELA's limitation period. 380 U.S. at 424-25. Promptly after the state action was dismissed for improper venue, but after FELA's limitation period had expired, the employee filed suit in federal court. *Id.* at 425. The district court dismissed the case as time barred. *Id.* In reversing the dismissal, and finding the claim timely under equitable tolling principles, the Court reasoned that the claimant:

> did not sleep on his rights but brought an action within the statutory period in the state court of competent jurisdiction. . . . [He] failed to file a [] FELA action in the federal courts, not because he was disinterested, but solely because he felt that his state action was sufficient. Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue.

Id. at 429-30.

Similarly, Ford did not sleep on his rights, but filed defective (mixed) habeas petitions in a court of competent jurisdiction within the limitation period. The State successfully moved to dismiss the petitions as unexhausted and then – after Ford followed the court's orders, exhausted state remedies and returned to federal court – moved to dismiss the second petitions as time barred. The State was not prejudiced by the late filing, because it was aware of Ford's prior, timely efforts to vindicate his federal habeas rights.

This Court's recognition that equitable tolling is proper when a court has led the plaintiff to believe that he has done everything required of him also compels tolling in the case at bar. *Baldwin County Welcome Center*, 466 U.S. at 151. Unaware of the effect of AEDPA's limitation period, Ford followed an option provided by the court, promptly presented his unexhausted claims to state court, and quickly returned to federal court after his state petitions were dismissed, only to have his second petitions dismissed as untimely.

Equitable tolling is also warranted under another line of cases holding that a party's reliance on a court order or on the statements or conduct of a judge justifies tolling. This principle is so firmly established that this Court has held that such reliance justifies extensions of jurisdictional bars, such as the time to file a notice of appeal. *Thompson*

v. I.N.S., 375 U.S. 384 (1964) (per curiam) (late-filed notice of appeal deemed timely when date selected for filing notice was made in reliance on district court's incorrect statement that new trial motion was filed "in ample time"); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam) (late-filed notice of appeal deemed timely when time for filing notice was based on district court's order, later reversed by court of appeal, that deadline was extended because of excusable neglect).

The misleading orders given to Ford are particularly egregious in light of the duty of the courts "to take appropriate measures to permit the adjudication of *pro se* claims on the merits, rather than to order their dismissal on technical grounds." *Donald v. Cook Co. Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996); *Castro*, 124 S. Ct. 786 (requiring advisements to *pro se* litigants in § 2255 cases).

The propriety of granting equitable tolling under AEDPA when courts misled *pro se* petitioners is illustrated by *United States v. Patterson*, 211 F.3d 927 (5th Cir. 2000). In *Patterson*, a *pro se* prisoner timely filed a motion challenging his federal conviction under 28 U.S.C. § 2255. 211 F.3d at 928. He moved to voluntarily withdraw the motion without prejudice "'so that he could find an experienced writ-writer'" and refile his motion at "'a later date.'" *Id.* The district court granted the request and dismissed the § 2255 motion without prejudice.

When Patterson refiled his § 2255 motion nearly a year later, it was dismissed as untimely. 211 F.3d at 930. The Fifth Circuit granted equitable tolling to render the late-filed motion timely. The court explained, in reasoning applicable here:

> At the time Patterson moved to dismiss his petition, he and the district court apparently were under the mistaken impression that he would not be time-barred from filing another § 2255 motion. . . . [P]atterson relied to his detriment on the district court's granting of his request to dismiss the initial, timely filed § 2255 motion in order to refile it at a later date. The declared

> reason for Patterson's request to withdraw the initial § 2255 motion was to file another (with the assistance of a writ-writer) at a later date. However, on the very date that the district court dismissed Patterson's initial § 2255 motion (over the government's objections), April 30, 1997, any future filings would have been time-barred . . . .
>
> We are persuaded that these circumstances are sufficiently rare and extraordinary to warrant equitable tolling . . . .

Id. at 931-32.

CONCLUSION

The judgment in the Court of Appeals should be affirmed. *Amici* request that if the Court reaches the equitable tolling issue, it hold that Ford is entitled to tolling; and that if the Court announces standards to apply to equitable tolling claims under AEDPA, it set forth standards consistent with those recommended herein.

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Respectfully submitted,

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230